90-4 24

No. _____

IN THE
SUPREME COURT OF UNITED STATES

October Term, 1990

J.J. BLONIEN & ASSOCIATES, INC. and
CITY OF WEST ALLIS,

Petitioners,

v.

COMMUNITY NEWSPAPERS, INC. and
ELSA R. SCHUPMEHL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS DISTRICT I

Michael Sachen
7525 W. Greenfield Ave.
West Allis, WI 53214
(414)256-8258

John J. Kastl
1112 South 60th Street
West Allis, WI 53214
(414)778-1128
Counsel for City of
West Allis

Howard Goldberg
Counsel of Record
Margaret Baumgartner
DeWitt, Porter, Huggett,
Schumacher & Morgan, S.C.
Suite 600
2 East Mifflin Street
Madison, WI 53703
(608)255-8891
Counsel for J.J. Blonien &
Associates, Inc.

Dated: September 6, 1990

QUESTION PRESENTED

Wisconsin law mandates that municipalities publish notice of matters of local governance in a newspaper meeting certain statutory eligibility requirements. The Wisconsin courts ruled that only newspapers which actually charge their readers a fee to receive copies are permitted by statute to print municipal notices.

The question presented is whether, under the Fourteenth Amendment, the State of Wisconsin may constitutionally prohibit publication of notice in a newspaper which does not charge its readers, thereby denying notice to citizens who cannot afford to pay a fee.

LIST OF PARTIES

The petitioner, J.J. Blonien & Associates, Inc., is a Wisconsin corporation and has no parent companies, subsidiaries or corporate affiliates. The petitioner, City of West Allis, is a municipal corporation of the second class formed within the municipal laws of Wisconsin.

In addition to the parties listed in the caption on the cover of this document, the Attorney General of Wisconsin was notified of the constitutional issues presented in the appeal as required by Wisconsin law but declined to participate.[1] (R-52)[2]

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[1] *See, Midwest Mutual Insur. Co. v. Nicolazzi*, 138 Wis.2d 192, 202, 405 N.W.2d 732 (Ct. App. 1987).

[2] Despite the fact that the record presently remains with the courts below, petitioners will continue to cite to the record as indexed for purposes of the appeal in the Wisconsin courts.

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The Opinion of the Wisconsin Court of Appeals is reported as *Community Newspapers, Inc. v. City of West Allis*, 156 Wis.2d 350, 456 N.W.2d 646 (Ct.App. 1990); rev. denied ___ Wis.2d ___, 458 N.W.2d 532; and is reprinted in the Appendix, pages 101-17. The Order of the Milwaukee County Circuit Court, Case No. 88-CV-010195, (April 12, 1989), is reprinted in the Appendix, pages 118-28. The Order of the Wisconsin Supreme Court denying review, reported at ___ Wis.2d ___, 458 N.W.2d 532, is reprinted in the Appendix, pages 129-30.

JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a), which permits review where a state statute has been challenged as repugnant to the United States Constitution.

The Wisconsin Court of Appeals, District I, rendered its opinion and decision on April 17, 1990. The Wisconsin Court of Appeals determined that it was constitutionally permissible to mandate notice publication only in newspapers which are purchased by readers and no others. Review is thus appropriate. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959).

The Wisconsin Supreme Court, Justice Abrahamson dissenting, denied review on June 12, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Amend. XIV, sec. 1, United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

The statute at issue is Section 985.03(1)(a) of the Wisconsin Statutes. That statute provides:

> 985.03 Qualification of newspapers. (1)(a) No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 years immediately before the date of the notice publication, the newspaper has been published regularly and continuously in the

city, village or town where published, and has had a bona fide paid circulation:

1. That has constituted 50% or more of its circulation; and,

2. That has had actual subscribers at each publication of not less than 1,000 copies in 1st and 2nd class cities, or 300 copies if in 3rd and 4th class cities, villages or towns.

Also involved are Wis. Stats. §985.01:

(2) The term "legal notice" is every notice required by law or by order of a court to be published in a newspaper and includes:

a) Every publication of laws, ordinances, resolutions, financial statements, budgets and proceedings intended to give notice in an area;

b) Every notice and certificate of election, facsimile ballot, referenda, notice of public hearing before a governmental body, and notice of meetings of private and public bodies required by law; and

c) Every summons, order, citation, notice of sale or other notice which is intended to inform a person that he may or shall do an act or exercise a right within a designated period or upon or by a designated date.

. . .

(4) "Proceedings", when published in newspapers, mean the substance of every official action taken by a local governing body at any meeting, regular or special.

and also Wis. Stats. §985.02(1):

> **Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected. Whenever the law requires publication in a newspaper published in a designated municipality or area and no newspaper is published therein publication shall be made in a newspaper likely to give notice.**

STATEMENT OF THE CASE

The petitioner, J.J. Blonien & Associates, Inc., ("Blonien") is a publishing company located in West Allis, Wisconsin, a small suburban city of about 64,000 inhabitants[3] located outside of Milwaukee. Blonien publishes a weekly newspaper for circulation to about 25,000 homes in West Allis, which is entitled the *West Allis Enterprise*. (R-39) A rival weekly newspaper entitled the *West Allis Star* is published by the respondent, Community

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[3]*See, Wisconsin Blue Book*. 1987-88, p.721.

Newspapers, Inc. ("Community"), with a weekly circulation of about 4,000 to 5,000. (R-35)

The case arose in 1988 when the petitioner, City of West Allis ("City"), accepted Blonien's lower bid for the 1988-89 annual contract to print its municipal notices. Under Wisconsin law, the City must publish all notices as defined in Wis. Stats. §985.01(2). For most Wisconsin municipalities, this publication requirement cannot be satisfied by posting or by publication through any other media. Rather, municipal notices may only be published in a newspaper meeting the statutory qualifications in Wis. Stats. §985.03(1) or a daily $100 fine may be imposed pursuant to Wis. Stats. §985.03(2). Further, as a second class city, the City must invite bids from

eligible newspapers for printing its notices and award the printing contract to the lowest bidder.[4]

In April of 1988, as required under Wisconsin law, the City invited bids for the annual printing contract. Blonien submitted a bid of $4.95 per column inch to print the City's notices in the *West Allis Enterprise*. Community submitted a bid of $5.50 per column inch to print the City's notices in the *West Allis Star*. (R-51) After the City awarded the contract to Blonien as the lowest bidder, Community brought suit in Milwaukee County Circuit Court for declaratory judgment and injunctive relief.[5] (R-1)

Community alleged that Blonien's newspaper, the *Enterprise*, did not meet the requirements of Wis.

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[4]*See*, Wis. Stats. §985.06

[5]Community eventually added a West Allis taxpayer and the mother of one of its attorneys, the Respondent Elsa R. Schupmehl, as a plaintiff in the suit. (R-27,40)

Stats. §985.03(1)(a). Specifically, Community alleged that the *Enterprise* was not qualified to print notices because West Allis residents do not pay a fee to receive copies of the *Enterprise*. Rather, circulation is paid for entirely by the advertisers as part of Blonien's circulation policy and, thus, the *Enterprise* is circulated by carrier to all consenting West Allis households without charge. Free home delivery is guaranteed to all who wish to receive the *Enterprise* within West Allis.[6] (R-39)

In contrast, Community charges a fee for receipt of the *Star*. Claiming that Community was thus the only qualified bidder under the statutory qualifications, respondents moved for partial summary judgment voiding the contract between

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[6]Persons who reside outside of the West Allis delivery area do pay a fee to receive the newspaper.

Blonien and the City and awarding the contract to Community. (R-30) On their motion, respondents stipulated that the *Enterprise* was a newspaper as defined in the Wisconsin Statutes.[7] (R-31) Respondents also acknowledged that the costs of creating and circulating newspapers are largely covered by revenue received from advertisers. (R-49)

The dispute rested on the legal consequences of the fact that the *Enterprise* was generally available to all West Allis residents without charge and the *Star* was generally available only for a fee. (R-31,49) The petitioners argued in defense that the statutory interpretation pressed by the respondents, which would effectively withhold notice of matters affecting local self-government from citizens who could not

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[7] *See*, Wis. Stats. §985.03(1)(c).

pay, was not consistent with the constitutional principles of equal protection and due process set forth in the Fourteenth Amendment. (R-38,41)

Nonetheless, Circuit Judge Russell W. Stamper of the Milwaukee County Circuit Court construed the statute at issue to require that a newspaper charge at least half of its readers a fee in order to be eligible to print municipal legal notices. The trial court concluded that a newspaper delivered to all households without charge is, for that reason alone, not permitted to contract with a municipality to print its notices. The trial court then granted the respondents' motion for partial summary judgment but rejected their request to mandate an award of the contract to Community. (Ap.127-28) The trial court did not address the constitutional questions.

Blonien appealed to the Wisconsin Court of Appeals. On appeal, Blonien again raised the constitutional challenge, being adversely affected by the trial court's interpretation of the statute both as a West Allis publisher desiring to compete for the City's legal advertising and as a West Allis taxpayer.[8] (R-39)

Concluding that a newspaper must have "paying subscribers" in order to qualify as a legal notice medium, the Court of Appeals ruled that the statute as construed was constitutional. The Court of Appeals acknowledged that the ability to pay may not be used as a criterion for the exercise of fundamental political rights. Nonetheless, the Court of Appeals determined that it was constitutionally

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[8]*See, e.g., Thompson v. Kenosha County*, 64 Wis.2d 673, 221 N.W.2d 845 (1974); *U.S. v. SCRAP*, 412 U.S. 669, 689 n.14, (1973).

permissible to require citizens, in effect, to purchase the notice indispensable for the exercise of such rights because no citizen was actually precluded from voting based on the inability to pay. (Ap.112-17) Although notices involve public hearings, municipal proceedings and similar matters as well as elections, the Court of Appeals never examined the impact of the law on other fundamental political rights of local self-government such as the right to petition and the right to associate politically.

Upon receipt of the adverse decision of the Wisconsin Court of Appeals, Blonien petitioned the Wisconsin Supreme Court for discretionary review. Review was denied by Order, dated June 12, 1990, with one dissent. (Ap. 129-30)

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS TOUCHING UPON FUNDAMENTAL POLITICAL RIGHTS.

A. The Wisconsin Court's Decision Means, In Effect, That Wisconsin Citizens Must Pay A Fee To Receive The Notice Essential To The Exercise Of Their Fundamental Rights.

This case involves important constitutional considerations of first impression regarding the publication and accessibility of public or "legal" notice to state citizens. These notices involve rights which form the very foundation of our political system of self-government: the right to vote, the right to associate politically, and the right to petition. Unless changed by this Court, it is now established law in Wisconsin that a municipality must discriminate against its poorer constituents by giving notice of *inter alia*, elections, referenda, municipal

meetings, and public hearings only to those who can afford to buy a newspaper.[9]

In the view of the Wisconsin courts, Wis. Stats. §985.03(1)(a) requires Wisconsin municipalities to publish such notices only in newspapers which charge the ultimate recipients a fee. In effect, then, the intended recipients of legal notice must buy it from a private publishing entity. Yet, their tax dollars are already being expended to ***give*** notice.

The state law at issue implicates substantive and procedural due process in matters affecting "life, liberty and property" under the Fourteenth Amendment. Petitioners submit that access to public affairs and notice is a liberty interest protected by the due process clause. However, where discrimination occurs against a class of persons similarly

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[9]*See*, Wis. Stats. §985.01(2) *infra.* at page 4.

situated, these due process principles really fall within the purview of the equal protection clause of the Fourteenth Amendment. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

The equal protection clause prohibits states from imposing fee requirements which impede the exercise of fundamental rights by the less-affluent. Classifications based on wealth are "traditionally disfavored" when they burden citizens' fundamental political rights. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-68 (1966), a case voiding an annual $1.50 poll tax because even a minimal price on the franchise, once granted by a state, constituted an invidious wealth discrimination.

1. Notice is essential to the right to vote.

Notice is vital to the right to vote. The right to vote in a free and unimpaired manner is

preservative of other basic civil and political rights. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Id.* In Wisconsin, "[V]oting is a constitutional right, the vigorous exercise of which should be strongly encouraged." Wis. Stats. §6.84.

It seems elementary that citizens cannot exercise their right to vote without the requisite knowledge of when, how, and where to vote and what they may be voting on. In recognition of that fact, specific laws with respect to notice of the dates and times of elections, facsimile ballots, referenda, and absentee voting for the aged and disabled, among others, are carefully incorporated into the election laws of Wisconsin.[10] Yet, these same notice

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[10] *See*, Wis Stats. §10.01, *et seq.*

laws are subject to the newspaper eligibility requirements of Wis. Stats. §985.03(1)(a). Thus, if the Court of Appeals' decision is permitted to stand, the notice critical for the exercise of the franchise is available only to those who can afford to purchase it.

2. Notice is essential to the rights of petition and association.

The right to vote is closely related to the fundamental rights of political association found in the First Amendment. *See*, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (access to ballot of independent political parties); *William v. Rhodes*, 393 U.S. 23 (1968) (right to associate for advancement of political beliefs).

The First Amendment right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights." *Mine Workers v. Illinois Bar*

Assoc., 389 U.S. 217, 222 (1967). The values in the right of petition "as an important aspect of self-government are beyond question." *McDonald v. Smith, N.C.*, 472 U.S. 479, 483 (1985).

At the local level, it has been recognized that citizens are most directly involved in the exercise of self-government and political organization. *Ortiz v. Hernandez Colon*, 385 F. Supp. 111, 116 (Dt.Ct. P.R. 1974). Wisconsin recognizes this principle in its provisions for municipal home-rule, Wis. Const., Art. XI, §3, and for municipal "direct legislation" by petition, Wis. Stats. §9.20, a statute implementing legislative powers reserved by the people according to *State ex rel. Althouse v. Madison*, 79 Wis.2d 97, 118-19, 255 N.W.2d 449 (1977). These principles of open and participatory government are strongly expressed in Wisconsin's open meetings laws:

> **In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.**

Wis. Stats. §19.81(1), *et seq.*

The assumption that notice is essential to open and participatory government underlies the specific requirements for notice set forth in these laws.[11] Again, however, that notice may only be published in a newspaper which charges a fee to its readers. The fundamental rights of petition and political association, intimately linked with the power to vote, are impaired when the knowledge indispensable to their exercise is withheld. Their political

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[11]Direct legislation petitions, when submitted to a vote of the electorate, must be noticed by the city clerk. Wis. Stats. §9.20(5). Every meeting of a governmental body shall be preceded by notice. Wis. Stats. §19.83.

effectiveness is entirely dependent on notice. Yet, only those who pay a fee to a private publisher are presently deemed entitled to receive notice under Wisconsin law.

B: Although Notice Is Indispensable To The Democratic Process, The Right To Receive Notice Without Charge Appears To Be An Issue Of First Impression In The Courts.

Every citizen has an inalienable right to an opportunity for full and equally effective participation in the political processes of the state's legislative bodies. *Reynolds*, 377 U.S. at 565-6. The Wisconsin Court of Appeals agreed that the opportunity for equal participation "is a *sine qua non* to a citizens' role in the affairs of government." (Ap. 112) The Court of Appeals would not acknowledge, however, that notice is necessary to have that opportunity. It is meaningless to describe the rights

essential to political participation as fundamental precepts of liberty and not to acknowledge a correlative right to a meaningful opportunity to obtain the information indispensable for the exercise of such rights.

While no case that we could find has specifically addressed this issue, the proposition that citizens have a right to notice seems so basic as to not require expression. The purpose of "notice" is to provide:

> ...information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate.

Record Publishing Co. v. Kainrad, 49 Ohio St.3d 296, 551 N.E.2d 1286 (Ohio 1990), citing *Black's Law Dictionary* (5 Ed. 1979) 957. Surely, the "right to

know" is as much a part of the rights to vote, petition and associate as the right to form political parties or to appear on the ballot.

Similarly, notice is as vital to a citizen's interest in liberty as it is to a creditor's interest in property. Yet, most notices affecting property interests require mailing and/or personal service in order to comply with due process. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988). This is because the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314. Likewise, the right to vote or to petition or to associate has "little reality or

worth unless one is informed" of the matter that is pending. *Id.*

Of course, the issue here has never been whether a municipality must provide actual notice by mail or personal service to each of its citizens. Rather, the issue is whether its citizens must pay a fee to receive notice. A municipality might not be required to mail or serve actual notice to individuals for reasons of economy and efficiency. However, this is not a valid reason for requiring citizens to pay a fee to a private publishing entity to receive notice. Notice should at least be available to all without regard to the ability to pay.

Petitioners submit that the Constitution requires a meaningful opportunity to obtain the necessary information for the effective exercise of political rights. It requires more than telling citizens

to search out the information at the library. Yet, the Wisconsin Court of Appeals' ruling permits more rights to a creditor than to a voter, particularly an impoverished voter.

II. THE WISCONSIN COURT'S DECISION CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT REGARDING IMPERMISSIBLE WEALTH-BASED DISCRIMINATION.

A. This Court Has Continuously Protected Access To the Political Process By Striking Fee Requirements Which Impede The Exercise Of Fundamental Rights.

While no case specifically deals with the question here, this Court has consistently held invalid wealth-based classifications which interfere with various fundamental rights. *See*, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Douglas v. California*, 372 U.S. 353 (1963); *Harper, supra.* (right to vote); *Bullock v. Carter*, 405

U.S. 134 (1972) (right to vote for the candidate of one's choice); *Lubin v. Panish*, 415 U.S. 709 (1974) (right to appear as candidate on a ballot). Wealth burdens on fundamental rights are subject to strict scrutiny, *i.e.*, there must be a showing that the wealth classification is necessary to achieve a compelling state interest. *Bullock*, 405 U.S. at 143-44.

In addition to rejecting the poll tax and ballot access fees, this Court has struck down property-holder requirements. A Louisiana statute permitting only property taxpayers to vote in local bond referenda was subject to strict scrutiny and held to be a violation of equal protection in *Cipriano v. Houma*, 395 U.S. 701 (1969). Accord: *Hill v. Stone*, 421 U.S. 289 (1975) and *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). Likewise, in *Kramer v. Union Free School District No. 15*, 395 U.S. 621

(1969), the Court held unconstitutional a law permitting only property owners and parents to vote in school district elections. The State of Georgia could not constitutionally require property ownership as a qualification for a seat on a county board of education. *Turner v. Fouche*, 396 U.S. 346 (1970).

In numerous cases, the Court has followed the principle that a person's "mere property status cannot be used by a state to test, qualify, or limit his rights as a citizen." *Edwards v. California*, 314 U.S. 160, 184 (1941). Whether paltry or prohibitive, whether directly or indirectly, any fee imposed by a state which burdens effective participation in the political process violates equal protection. Just as wealth may not be a criterion for the actual exercise of a right, it should not be a criterion for the receipt of the notice necessary to exercise the right. In

either instance, less affluent citizens are precluded from free and equally effective participation based solely on their inability to pay. In following the principles set forth in *Turner*, *supra.*, and *Harper*, *supra.*, it has been stated:

> Limiting at any level the rights of members of the community to participate in the political process because of their economic station in life offends our most basic understanding of the nature of our government and society.

Woodward v. City of Deerfield Beach, 538 F.2d 1081, 1083 (5th Cir. 1976). Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. *Kramer*, 395 U.S. at 626.

B. The Wisconsin Court Of Appeals Erred In Refusing To Acknowledge The Impact Of A Fee Requirement On Fundamental Rights.

The impact of a fee system limiting participation in the political process must be carefully examined. *Bullock*, 405 U.S. at 142-3. The ballot access fee at issue in *Bullock*, while not precluding anyone from voting, nonetheless fell with unequal weight on voters "according to their economic status" and deprived them of the opportunity to vote for the candidate of their choice. *Id.* at 144. The Wisconsin Court of Appeals, while recognizing that a state may not impede fundamental rights because of distinctions based on wealth, erroneously believed that no fundamental rights are contingent on wealth in this matter.

It should be noted that there is no statutory limit on the amount a newspaper may charge for a

single copy or for a subscription. The Wisconsin statute does not specify what may be charged so long as the charge is more than zero. Nothing precludes the publication of notice in a business or law reporter which is prohibitively expensive for certain segments of the public.[12] Nonetheless, even a small sum can have the same effect and is equally suspect. *Harper*, 383 U.S. at 666, 670.

Such a law can be used to frustrate rights in ways similar to poll taxes and property-holder requirements. Its impact is neither remote nor incidental to the exercise of fundamental political rights. It falls with unequal weight on voters according to their economic status. The Wisconsin Court of Appeals refused to recognize the similarity.

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[12]Such publications are deemed newspapers under Wis. Stats. §985.03.

Instead, it concluded, contrary to the reasoning in *Bullock*, that strict scrutiny should not be applied because no citizen was theoretically prohibited from voting. It then speculated that a purchased newspaper is more likely to be read.[13]

In this case, however, Blonien's newspaper is circulated to 25,000 households in a community of about 64,000 inhabitants. By contrast, Community's newspaper is circulated to only a few thousand households in this community. Surely, Blonien's newspaper, which is distributed to all who want it without charge, is more "likely to give notice"

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[13]Applying the rational basis test, the Court of Appeals decided, based not on the facts before it but rather on "common experience", that a purchased newspaper is more likely to be read and to contain news of general interest. Yet, the expressed intent of the statute is to "*give* notice", not to restrict notice solely to those who are "more likely" to read it.

consistent with that purpose as set forth in Wisconsin notice law and with constitutional principles.[14]

In addition, it should be noted that such a law is anticompetitive. Blonien is Community's only potential competitor for the City's legal notice contract.[15] (R-39) Thus, rather than serving any fiscal purpose, the statute thwarts competition by permitting a municipality no recourse but to publish in a monopoly newspaper. In these days when it is important for governmental units to minimize their costs, the state courts' ruling has a significant adverse impact on their ability to do so. The effect of these newspaper eligibility requirements is to limit

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[14] *See*, Wis. Stats. §985.02(1) *infra.* at page 4.

[15] Wis. Stats. §§985.01(5), 985.06 and 985.065 lay out the various bidding requirements for legal notice printing contracts. Section 985.06 also requires notice publication in a newspaper published in the municipality. The *Enterprise* and the *Star* are the only two newspapers which presently are or claim to be published within the City of West Allis. (R-39)

the reach of notice and subsidize one group of privately-owned newspapers, all at greater expense to the public.

According to the Wisconsin Court of Appeals, those who have the discretionary income to buy the sanctioned newspaper are entitled to receive the vital information affecting their participation in the affairs of their local government; those who do not should search it out at the library. Rather than achieve any kind of compelling or rational purpose, such a distinction serves only to frustrate statutory and public policy objectives with the fiscal consequences falling on the over-burdened taxpaying public. Such a distinction inhibits and dilutes the voice of the less-affluent in their local governance and cries for review by this Court.

CONCLUSION

Because this case presents important constitutional issues, the petitioners respectfully request this Court to review the Wisconsin Court of Appeals' decision. We respectfully submit that the Court should review whether it is constitutional for a state to force its citizens to pay a fee to a private entity in order to obtain the notice prerequisite to their effective participation in local self-government.

Dated this 6th day of September, 1990.

By: Howard Goldberg
Counsel of Record
Margaret Baumgartner
DeWitt, Porter, Huggett,
Schumacher & Morgan, S.C.,
2 East Mifflin Street, Suite 600
Madison, WI 53703
(608)255-8891
Attorneys for J.J. Blonien & Associates, Inc.

Michael Sachen
7525 W. Greenfield Ave.
West Allis, WI 53214
(414) 256-8258

John J. Kastl
1112 South 60th Street
West Allis, WI 53214
(414) 778-1128
Attorneys for City of West Allis

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APPENDIX

Michael Sachen
City Attorney
7525 W. Greenfield Ave.
West Allis, WI 53214
(414)256-8258

John J. Kastl
1112 South 60th Street
West Allis, WI 53214
(414)778-1128
Counsel for City of
West Allis

Howard Goldberg
Counsel of Record
Margaret Baumgartner
DeWitt, Porter, Huggett,
Schumacher & Morgan, S.C.
Suite 600
2 East Mifflin Street
Madison, WI 53703
(608)255-8891

COMMUNITY NEWSPAPERS, INC.,
and Elsa R. Schupmehl,
Plaintiffs-Respondents,

v.

The CITY OF WEST ALLIS,
Defendant,
and
J.J. BLONIEN & Associates, Inc.,
also d/b/a The West Allis
Enterprise, Defendant-Appellant.

No. 89-0998.

Court of Appeals of Wisconsin.

Submitted on Briefs Feb. 7, 1990.

Opinion Filed April 17, 1990.

Opinion Released April 17, 1990.

Newspaper appealed from order of the Circuit Court, Milwaukee County, Russell W. Stamper, J., which invalidated its contract with city to publish legal notices. The Court of Appeals, Sullivan, J., held that: (1) newspaper circulation paid for by advertising revenues does not constitute "paid circulation" for purposes of statute governing official newspapers; (2) term "subscribers" in that statute does not include persons who do not return newspapers delivered without charge to

their doorstep; and (3) requirement of paid circulation in the statute does not violate equal protection guarantees.

Affirmed.

1. Appeal and Error 842(8)

Application of an unambiguous statute to a given set of facts presents a legal issue which is reviewed without deference to the trial court's conclusion.

2. Statutes 184

Court is bound to construe a statute in a manner that effects the legislative purpose.

3. Newspapers 3(5)

Newspaper circulation which is paid for by advertising revenues does not constitute "paid circulation" for purposes of statute setting forth qualifications for newspapers which publish legal notices. W.S.A. 985.03(1)(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Newspapers 3(5)

Term "subscribers" as used in statute setting forth qualifications for newspapers which publish legal notices does not include persons who do not return papers delivered without charge to their doorstep. W.S.A. 985.03(1)(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law 225.2(1)

Statute requiring that newspaper meet certain paid subscription qualifications in order to receive contract to publish legal notices was not subject to strict scrutiny when challenged on the basis that it violated equal protection because persons who are too poor to purchase a newspaper would not receive notice of elections. W.S.A. 985.03(1)(a); U.S.C.A. Const.Amend. 14.

6. Constitutional Law 225.2(1)

Newspapers 3(5)

Statutory requirement that newspaper meet certain paid subscription requirements in order to receive contract to publish legal notices is a logical classification based on legislative consideration of the common experience that a person who pays for a newspaper is more likely to read it, notwithstanding claim that it denies equal protection to persons who are too poor to buy newspapers because they will not receive notice of elections. W.S.A. 985.03; U.S.C.A. Const.Amend. 14.

Margaret Baumgartner and Howard Goldberg of DeWitt, Porter, Huggett, Schumacher & Morgan, S.C., Madison, on briefs, for defendant-appellant J.J. Blonien & Associates, Inc.

Carolyn Gnaedinger of Quarles & Brady, and Richard C. Gad of Richard C. Gad, S.C., Milwaukee, on briefs, for plaintiffs-respondents Community Newspapers, Inc. and Elsa R. Schupmehl.

Before MOSER, P.J., and SULLIVAN and FINE, JJ.

SULLIVAN, Judge.

J.J. Blonien & Associates, d/b/a *The West Allis Enterprise*, appeals from a partial summary judgment declaring a contract for the publication of legal notices void and enjoining the City of West Allis from spending public funds to publish legal notices in the *Enterprise*. Because we conclude that the *Enterprise* failed to qualify for the publication of legal notices under sec. 985.03(1)(a), Stats., and because we conclude that the trial court's interpretation of that statute does not deny a segment of the electorate its right of equal protection, we affirm the order of the trial court.[1]

In April of 1988, Blonien and Community Newspapers, Inc. (CNI), publisher of the *West Allis Star*,

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[1]On January 29, 1990, the City of West Allis made a motion to consolidate Case No. 90-0202 with this pending appeal. In support of its motion, the City argues that the issues in the cases are identical. However, several issues in the appeals are not identical. Because determination of the pending appeal may resolve common issues, the City's motion is denied.

submitted bids on a contract to publish legal notices for the City of West Allis. Blonien submitted a bid to publish the notices in the *Enterprise* for $4.95/column inch. CNI's bid for publication in the *Star* was at $5.50/column inch. The City awarded a one-year contract to Blonien.

CNI filed this action against Blonien and the City seeking declaratory and injunctive relief. On CNI's motion for summary judgment, the trial court concluded that under the terms of sec. 985.03, Stats., the *Enterprise* did not qualify for the publication of legal notices. That section provides:

> 985.03 **Qualification of newspapers.**
> (1)(a) No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 years immediately before the date of the notice publication, the newspaper has been published regularly and continuously in the city, village or town where published, and has had a bona fide paid circulation:
>
> 1. That has constituted 50% or more of its circulation; and,
>
> 2. That has had actual subscribers at each publication of not less than 1,000 copies in 1st and 2nd class cities, or 300 copies if in 3rd and 4th class cities, villages or towns.

The trial court concluded that the *Enterprise* was not qualified to carry legal notices because its "paid circulation" did not constitute 50% or more of its circulation. The court granted summary judgment in favor of CNI and declared the contract between Blonien and the City void.

Our review of an order granting summary judgment involves the same standards used by the trial court in its determination of the summary judgment motion. *Juneau Square Corp. v. First Wisconsin Nat'l Bank of Milwaukee*, 122 Wis.2d 673, 681, 364 N.W.2d 164, 168 (Ct.App.1985). When the pleadings, depositions, affidavits and other papers on file show that there is no genuine issue as to any material fact, the movant is entitled to judgment as a matter of law. Sec. 802.08(2), Stats. The motion is particularly appropriate when the determination of a legal issue or issues concludes the action. *Johansen v. Reinemann*, 120 Wis.2d 100, 101, 352 N.W.2d 677, 678 (Ct.App.1984).

Blonien contends that the *Enterprise* qualifies for the publication of legal notices under sec. 985.03. The thread of his argument ties sec. 985.02(1), Stats., which requires publication of a legal notice in a newspaper likely to give notice with the terms "bona fide paid circulation" and "subscribers" appearing in sec. 985.03(1)(a).[2] Blonien argues that paid circulation means payment from any source, including advertisers.

Each week, 25,000 copies of the *Enterprise* are delivered to the homes of West Allis residents. The cost of circulation is paid entirely by advertisers. There is no charge to the recipient. Blonien insists that under the terms of the statute payment from any source, readers, recipients, donors, friends, relatives, associates and institutions, as well as advertisers, constitutes a "paid circulation." He argues that contracts between the

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[2]*See* sec. 985.02(1), Stats. ("Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected.")

Enterprise and its advertisers legally bind it to publish and therefore assure its continuous circulation. He also argues that a "subscriber" is anyone who agrees or consents to accept delivery of a newspaper on a regular basis. A recipient's failure to request nondelivery of the *Enterprise*, Blonien concludes, implicitly establishes his or her status as a subscriber.

[1] The parties do not argue that sec. 985.03(1)(a) is ambiguous. In clear and easily understandable terms the statute sets forth the conditions a newspaper must meet before its publisher may lawfully contract for publication of legal notices. Application of an unambiguous statute to a given set of facts presents a legal issue which we review without deference to the trial court's conclusions. *State v. McManus*, 152 Wis.2d 113, 122-23, 447 N.W.2d 654, 657 (1989).

[2-4] We reject Blonien's analysis. It rends and tears at the fabric of sec. 985.03(1)(a). Selecting individual words, he defines them in a manner to reach his desired

result. While we are aware that a particular word may have a variety of meanings, *see Lukaszewicz v. Concrete Research, Inc.*, 43 Wis.2d 335, 342, 168 N.W.2d 581, 585 (1969), we are bound to construe a statute in a manner that effects its legislative purpose. *Id.* Therefore, we construe the meaning of individual words in an unambiguous statute in the context of its subject matter. *Id.* We are not free to interpret the words of an unambiguous statute to achieve a result clearly not intended by the legislature.

Section 985.03(1)(a) unambiguously requires that for publication of legal notices, a newspaper, for at least two prior years, must be published in the city and must have a bona fide paid circulation. Also, the paid circulation must consist of 50% or more of its total circulation, and subscribers in a city of the second class, such as West Allis, must number at least 1,000. *See Bartlett v. Joint County School Comm.*, 11 Wis.2d 588, 106 N.W.2d 295

(1960).[3] We reject as inconsistent with the subject and context of sec. 985.03(1)(a) Blonien's arguments that a newspaper circulation paid for by advertising revenues constitutes a "paid circulation," and that "subscribers" includes persons who do not return papers delivered without charge to their doorstep. Recipients of the *Enterprise* are not paid subscribers and rarely pay on a single-copy basis. The City's contract with Blonien contravenes sec. 985.03(1)(a) and is void. *See* 71 Op. Att'y Gen. 177 (1982).

Furthermore, we conclude that Blonien's analysis renders parts of the statute superfluous. The structure of sec. 985.03 clearly indicates that the legislature intended to distinguish between a "paid circulation" and a "circulation." To qualify under the statute, a newspaper's

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[3]In *Bartlett* the supreme court's analysis implicitly equated "paid subscribers" with the term "bona fide paid circulation to actual subscribers" that appeared in the predecessor to sec. 985.03, Stats. *See Bartlett*, 11 Wis.2d at 593, 106 N.W.2d at 297.

"paid circulation" must constitute 50% or more of its "circulation." *See* sec. 985.03(1)(a)1, Stats. Blonien argues that a "paid circulation" may be paid for by any source. However, he ignores the fact that every newspaper circulation is paid for by some source, be it subscribers, advertisers, or the publisher itself. Thus, under Blonien's analysis, every circulation would be a "paid circulation." We may not interpret a statute in a manner that renders any of its parts superfluous. *Milwaukee Metro. Sewerage Dist. v. Wisconsin DNR*, 122 Wis.2d 330, 336, 362 N.W.2d 158, 161 (Ct.App.1984). Because Blonien's analysis renders the word "paid" in the term "paid circulation" superfluous, it destroys the legislature's distinction between a "paid circulation" and a "circulation," and obviates the effect of sec. 985.03(1)(a)1, Stats. Therefore, we are bound to reject it.

Blonien next argues that the trial court's interpretation of sec. 985.03(1)(a) violates equal

protection.[4] He correctly argues that "the opportunity for equal participation by all voters" is a sine qua non to a citizen's role in the affairs of government. *See Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 1384, 12 L.Ed.2d 506 (1964). A statute which requires a citizen to obtain notice by purchase of a newspaper, Blonien argues, violates equal protection as much as a statute that requires a candidate to pay a fee to have his or her name

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[4] Amend. XIV, sec. 1, United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 1, sec. 1, Wisconsin Constitution provides:

> **Equality; inherent rights.** Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

The due process and equal protection provisions of the state and federal constitutions are substantially equivalent to each other. *State v. McManus*, 152 Wis.2d at 130, 447 N.W.2d at 660.

placed on the ballot, *see Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), or requires a voter to pay a poll tax, *see Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Blonien's argument is based on his assertion that some electors may be too poor to purchase a newspaper.

The scope and standard for our review of a constitutional attack upon a statute is restated in *State v. McManus*, 152 Wis.2d at 129, 447 N.W.2d at 660:[5]

> The constitutionality of a statute is a question of law which this court may review without deference to the lower court. Legislative enactments are presumed constitutional, and this court has stated it will sustain a statute against attack if there is any reasonable basis for the exercise of legislative power. The party bringing the challenge must show the statute to be unconstitutional beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality. The

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[5]Blonien does not expressly challenge the constitutionality of sec. 985.03(1)(a), Stats. He argues that the trial court's *interpretation* of the statute gives rise to an unconstitutional effect. Because we hold that the trial court's interpretation of the statute is correct and gives effect to the intent of the legislature, we will review this issue from the standpoint that Blonien has challenged the constitutionality of the statute itself.

> court cannot reweigh the facts found by the legislature. If the court can conceive any facts on which the legislation could reasonably be based, it must hold the legislation constitutional. [Citations omitted.]

See also State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 733, 416 N.W.2d 883, 892 (1987).

[5] Blonien argues that we should employ the "strict scrutiny" test to determine whether a specific governmental objective is involved in the publication restriction and whether the statute achieves that objective. However, he cites no authority to establish the right of each elector to individual notice of an election. His case authority pertains to statutes which directly bar exercise of a right. We reject Blonien's argument for two reasons. First, no elector's right to vote is contingent upon status of race, alienage, national origin or wealth. *See Moedern v. McGinnis*, 70 Wis.2d 1056, 1072, 236 N.W.2d 240, 248 (1975). Second, the statutes sufficiently provide for notice to be given "in the area," *see* sec.

985.02(1), Stats., or "in an area," *see* sec. 985.01(2)(a).[6] Blonien presents no valid reason why sec. 985.03(1)(a) should be held up to the litmus of strict scrutiny. In no way does it prohibit a particular class from exercising its right to vote. *See McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807-08, 89 S.Ct. 1404, 1407-08, 22 L.Ed.2d 739 (1969).[7]

Because there is no suspect class, we confine our inquiry to whether the legislative purpose embodied in sec. 985.03(1)(a) is irrational or arbitrary. *See Gerhardstein*, 141 Wis. at 733, 416 N.W.2d at 892. If a reasonable basis for the limit or classification exists, there is no equal protection violation. *Id.*

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[6]Blonien's concession that a constructive notice of election would fulfill constitutional requirements accords with the mandate of sec. 985.02(1), Stats., that notice be directed to the area.

[7]We also note that the Supreme Court has never held that wealth discrimination alone provides a basis for application of the strict scrutiny test. *See San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 29, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973).

[6] We conclude that the statutory scheme involving sec. 985.03 is based on a logical classification. If a newspaper is used as a method of publication, it must be likely to give notice in the area or to the persons affected. However, to qualify for compensation, publishers of newspapers must meet the paid circulation requirements. In this respect, the legislature could consider the common experience of life that a person who pays for a newspaper is more likely to read it, *see In re Avila*, 501 A.2d 1018, 1019 (N.J.Super.Ct.App.Div.1985), and that a paid-for newspaper contains news of general interest.

In assessing the type of notice of election which should be given to electors, the legislature was aware of the constantly changing composition of the electorate; i.e., electors moving in and out of the district, electors dying or suffering incapacity to vote. Personal notice of election to each elector is virtually impossible. The legislature was also aware of the fact that public libraries

invariably display the latest edition of local newspapers which any elector can peruse free of charge. Thus, the legislative distinction between paid and unpaid circulation in sec. 985.03 has a rational basis. Blonien has not proved that the notices published under its terms are unlikely to give notice in the area or to the person affected. Because its conditions for the publication of legal notices are neither arbitrary nor irrational, we affirm the decision of the trial court.

Order affirmed.

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

COMMUNITY NEWSPAPERS, INC. and ELSA R. SCHUPMEHL,	-	
Plaintiffs,	-	
v.	-	Case No. 010-195
THE CITY OF WEST ALLIS and J.J. BLONIEN & ASSOCIATES,INC., also d/b/a The West Allis Enterprise,	-	
Defendants.	-	

ORDER FOR PARTIAL SUMMARY JUDGMENT AND DECLARATORY AND INJUNCTIVE RELIEF

The plaintiffs' Motion for Partial Summary Judgment and Declaratory and Injunctive Relief on plaintiff's Amended Complaint, and for summary judgment in favor of plaintiffs on the Counterclaim of defendant J. J. Blonien & Associates, Inc.; and defendant J. J. Blonien & Associates, Inc.'s cross motion for summary judgment

dismissing the claim of Elsa R. Schupmehl and for reasonable attorneys fees and costs, came on for hearing and argument on March 13, 1988. The plaintiffs appeared by Carolyn Gnaedinger of Quarles & Brady and Richard C. Gad of Richard C. Gad, S.C., the defendant City of West Allis appeared by Michael J. Sachen, City Attorney, and John Kastl; defendant J.J. Blonien & Associates, Inc. appeared by Howard Goldberg and Margaret Baumgartner of DeWitt, Porter, Huggett, Schumacher & Morgan, S.C. The Court, having read the pleadings, motions, briefs, affidavits and exhibits, and having heard the arguments of counsel and being fully advised in the premises, makes the following findings of fact, conclusions of law and order:

FACTS

1. Effective May 19, 1988, the City of West Allis awarded a contract for the publication of its legal notices to J. J. Blonien & Associates, Inc. ("Blonien"), after making a determination that Blonien had submitted the lowest effective bid for publication of council proceedings

and legal notices for the period June 1, 1988 through May 31, 1989. Blonien has published the City of West Allis' notices and the City has made payments to Blonien under the terms of the contract since June 1, 1988 until March 27, 1989.

2. Plaintiff Community Newspapers, Inc. ("CNI") was an unsuccessful bidder on the contract for the publication of the City's legal notices. CNI was the second lowest bidder. Blonien bid at the rate of $4.95 per column inch and CNI bid at the rate of $5.50 per column inch.

3. Plaintiff Elsa R. Schupmehl is an adult who resides at 2145 South 59th Street, West Allis, WI 53209, and is and has been a resident and taxpayer of the City since at least 1973.

4. Defendant City of West Allis ("City") is a municipal corporation of the State of Wisconsin and is a city of the second class as defined in the Wisconsin statutes.

5. Blonien has published a weekly periodical named The West Allis Enterprise ("the Enterprise"), regularly and continuously on a weekly basis from and after May 1, 1986.

6. The Enterprise does not have, and did not at any time after May 1, 1986, have a bona fide paid circulation that constituted fifty (50) percent or more of its circulation. From and after May 1, 1986, Blonien has published 25,000 or more copies of the Enterprise each week. The great majority of those copies, and well over 50 percent thereof, are delivered each week to residences in the City by a private carrier paid by Blonien. Blonien mails a few copies to businesses and locations outside of the City. The residents of the City, to whom copies of the Enterprise are delivered by private carrier, do not pay a subscription fee to receive the Enterprise.

7. The Enterprise did not, during the period May 1, 1986 through May 31, 1988, have a paid circulation which had actual subscribers at each publication date of

1,000 or more copies; for instance, for the weekly issue of April 24, 1988, 25,550 copies were printed and 25,000 of those copies were distributed by the private carrier in West Allis. Therefore, for that publication date, the Enterprise's bona fide paid circulation, if any, could not have had actual subscribers of at least 1,000 copies, since only 550 copies remained after distribution of free copies by the private carrier.

8. Income from the sale of advertising space in the Enterprise has exceeded Blonien's expenses in producing and distributing the Enterprise.

CONCLUSIONS OF LAW

1. Plaintiff Schupmehl has standing as a taxpayer to challenge the validity of the contract between the City and Blonien, and to seek a declaration of the proper construction of sec. 985.03, Wis. Stats.

2. Plaintiff CNI has standing, as an unsuccessful bidder, and the only other bidder for the work, to challenge the validity of the contract between the City

and Blonien, and to seek a declaration of the proper construction of sec. 985.03, Wis. Stats.

3. This Court has jurisdiction and authority to render a declaratory determination of this case under sec. 806.04, Wis. Stats., under plaintiffs' Complaint and Blonien's Counterclaim.

4. There is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law and to the specific relief as set forth below.

5. Both CNI and Schupmehl have sufficiently complied with sec. 893.80, Wis. Stats., respecting claims against governmental bodies, officers and employees.

6. The City of West Allis suffered no prejudice by reason of the time when it became aware of the protective order in this case filed November 16, 1988. It knew or should have known of the existence of the Order no later than the week of January 9, 1989, and has not shown that it was precluded from doing any necessary discovery prior to the hearing on March 13, 1989.

7. Sec. 985.03, Wis. Stats., is clear and unambiguous.

8. The statutory requirement that a newspaper have "had a bona fide paid circulation that has constituted 50 percent or more of its circulation" means that for a period of at least two years immediately prior to notice publication, one-half or more of the total number of copies in circulation of the newspaper in which notices to be published must have been purchased by the ultimate recipient, the consumer, on the basis of a paid subscription fee or on a single copy basis.

9. The statutory requirement that the newspaper have "had a bona fide paid circulation ... that has had actual subscribers at each publication of not less than 1,000 copies in first- and second-class cities" means that for a period of at least two years immediately prior to notice publication, the newspaper in which notice is to be published must have had, at each publication date, at

least 1,000 actual subscribers who have paid a subscription fee for the newspaper.

10. One who purchases copies of a newspaper on a single copy basis is not a subscriber.

11. One who simply allows a copy of a periodical to be placed at his residence on a continuous basis, without objection, is not a subscriber.

12. The fact that Blonien's advertisers may have paid sufficient amounts in advertising charges to meet or exceed Blonien's expenses in producing or distributing its papers has no bearing on the determination of whether Blonien's publications meet the statutory requirements of sec. 985.03, Wis. Stats.

NOW THEREFORE IT IS HEREBY ORDERED AS FOLLOWS:

A. The plaintiffs' motion for a declaration that defendant City of West Allis unlawfully awarded J. J. Blonien & Associates, Inc. a contract to publish legal notices for the City is granted, and plaintiffs' motion for

a declaration that the contract between the City of West Allis and J. J. Blonien & Associates, Inc. is invalid, illegal and void, is granted.

B. The plaintiffs' Motion for Summary Judgment in their favor on Blonien's Counterclaim for Declaratory Judgment is granted.

C. The plaintiffs' motion for a preliminary injunction enjoining the City from expending any public funds to publish legal notices in the Enterprise is granted effective March 27, 1989.

D. In the exercise of the Court's discretion, and in light of sec. 985.06(4), Wis. Stats., the Court declines to order that the City award the remaining term of the contract to plaintiff CNI.

E. The Motion of defendant Blonien for Summary Judgment dismissing the claim of Elsa R. Schupmehl and for attorneys' fees and costs is denied.

F. The Court declares the proper construction of sec. 985.03, Wis. Stats., as follows:

1. The statutory requirement of sec. 985.03(1)(a) that:

> "No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 years immediately before the date of the notice publication, the newspaper has been regularly and continuously in the city, village or town where published, and has had a bona fide paid circulation;
>
> a. That has constituted 50% or more of its circulation ..."

means that for a period of at least two years immediately prior to notice publication, one-half or more of the total number of copies in circulation of the newspaper in which notice is to be published must have been purchased by the ultimate recipient on the basis of a paid subscription or on a single copy basis.

2. The statutory requirement of sec. 985.03(1)(a) that:

> "No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 years immediately before the date of the notice

> publication, the newspaper has been published regularly and continuously in the city, village or town where published, and has had a bona fide paid circulation;
>
> ...
>
> b. That has had actual subscribers at each publication of not less than 1,000 copies in 1st or 2nd class cities ...."

means that for a period of at least two years immediately prior to notice publication, the newspaper in which notice is to be published must have had, at each publication, at least 1,000 actual subscribers who have paid a subscription fee to receive the newspaper.

Dated at Milwaukee, Wisconsin this 12 day of April, 1989.

BY THE COURT:

/s/
Russell W. Stamper
Circuit Judge

Office of the Clerk

SUPREME COURT

State of Wisconsin

To: Madison, June 12, 1990

Hon. Russell W. Stamper
Milwaukee County
Circuit Court
901 N. 9th St., Rm. 409
Milwaukee, WI 53233

Richard C. Gad
Richard C. Gad, S.C.
1139 S. Knapp St.
Milwaukee, WI 53202

Carolyn A. Gnaedinger
Quarles & Brady
411 E. Wisconsin Ave.
Milwaukee, WI 53202-4497

James D. Jeffries
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John J. Kastl
Attorney at Law
1112 S. 60th St.
West Allis, WI 53214

*See Below

The Court today announced an order in your case as follows:

No. 89-0998 Community Newspapers, Inc., et al. v. The City of West Allis, et al. T.C. #010-195

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner J.J. Blonien & Associates, Inc., a petition to intervene filed on behalf of the City of West Allis, and a statement in opposition to petition to intervene filed on behalf of Community Newspapers, Inc. and Elsa R. Schupmehl, and considered by the court,

IT IS ORDERED that the petition for review is denied;

IT IS FURTHER ORDERED that the petition to intervene is dismissed as moot; and

IT IS FURTHER ORDERED that Community Newspapers is awarded $50 costs to be paid by J.J. Blonien & Associates.

*Margaret Baumgartner
DeWitt, Porter, Huggett,
Schumacher & Morgan
Two E. Mifflin St., #600
Madison, WI 53701

Howard Goldberg
Michael J. Sachen
City Attorney
7525 W. Greenfield Ave.
West Allis, WI 53214

Abrahamson, J., dissents.

MARILYN L. GRAVES
Clerk of Supreme Court

(3)

No. 90-424

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

J.J. BLONIEN & ASSOCIATES, INC. and
CITY OF WEST ALLIS,

Petitioners,

v.

COMMUNITY NEWSPAPERS, INC. and
ELSA R. SCHUPMEHL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS DISTRICT I

CAROLYN GNAEDINGER
Counsel of Record
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 277-5000

RICHARD C. GAD
RICHARD C. GAD, S.C.
1139 South Knapp Street
Milwaukee, WI 53202
(414) 273-1130
Counsel for Community
Newspapers, Inc. and
Elsa R. Schupmehl

Dated October 5, 1990

QUESTION PRESENTED

Wisconsin law mandates that municipalities publish notice of matters of local governance in a newspaper meeting certain statutory eligibility requirements. The Wisconsin courts ruled that only newspapers which actually charge not less than fifty percent (50%) of their readers a fee to receive copies are permitted by statute to print municipal notices.

The question presented is whether, under the Fourteenth Amendment, the State of Wisconsin may constitutionally prohibit payment by a municipality for publication of legal notices in a newspaper which does not charge at least fifty percent (50%) of its readers a subscription fee.

LIST OF PARTIES

The respondent, Community Newspapers, Inc., is a Wisconsin corporation and wholly-owned subsidiary of SunMedia Corp., a closely-held Delaware corporation. The respondent, Elsa R. Schupmehl, is an adult resident of Wisconsin and taxpayer of the City of West Allis, Wisconsin.

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a strict scrutiny analysis. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17, 29 (1973); statutes having different effects on the wealthy and the poor are not, on that account alone, subject to strict equal protection scrutiny, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450,458 (1988). Therefore, even if there are in fact citizens unable to afford the paid circulation newspaper, which has not been shown here, Petitioners must nevertheless identify impermissible interference with the exercise of a "fundamental right" in order to invoke strict scrutiny.

2. Actual Physical Notice of Municipal Matters Is Not a Fundamental Right Triggering Strict Scrutiny Analysis, Particularly Where Alternative Devices To Obtain Notice Are Available.

Petitioners assert that there exists an individual fundamental right protected by the United States Constitution requiring that a municipality must provide free of charge actual notice to every citizen of every publication of laws, ordinances, resolutions, financial statements, budgets and proceedings, and every notice and certificate of election, facsimile ballot, referenda, notice of public hearing before a governmental body, and notice of meetings of private and public bodies required by law. Petitioners cite no authority for this proposition. Petitioners then argue that this "fundamental right" is violated when notice is to be published only in a paid circulation newspaper, invoking a "strict scrutiny" analysis of § 985.03, Wis. Stats., founded on claimed equal protection discrimination based on wealth. Such an analysis is unnecessary and inappropriate.

Petitioners cite no case which holds that actual physical notice of governmental activities, including notices of election, is a "fundamental right" under the Constitution. Nor do Petitioners cite any case which holds that lack of actual physical notice interferes with any fundamental right, such as the right to vote, to assemble, or to petition the government. Instead, the Petition cites a number of cases which struck down laws which *absolutely prohibited* someone from voting or running for office, unless the person paid a fee, or was a property owner. Thus, in *Bullock v.*

Carter, 405 U.S. 134, 137 (1972), payment of a filing fee was "an absolute requisite" to a candidate's participation in a primary election. In *Cipriano v. City of Houma*, 395 U.S. 701, 703 (1969), plaintiff was prevented from voting "solely because he was not a property owner." In *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 206 (1970), "only otherwise qualified voters who are also real property taxpayers were permitted to vote" on certain bond issues. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966), involved a poll tax system which "excludes those unable to pay a fee to vote or who fail to pay." *Hill v. Stone*, 421 U.S. 289, 293 (1975), involved a law which restricted the right to vote to persons who rendered property for taxation in the election district. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626, n.6. (1969), involved legislation which limited the right to vote to those who owned or leased real property or were parents of children enrolled in school, and was thus "an absolute denial of the franchise." *Lubin v. Panish*, 415 U.S. 709, 718 (1974) involved denial of nomination papers to file as a political candidate "solely on the basis of ability to pay a fixed fee without providing any alternative means . . .". *Turner v. Fouche*, 396 U.S. 346 (1970) and *Woodward v. City of Deerfield Beach*, 538 F.2d 1081 (5th Cir. 1976) struck down legislation which required candidates for office to be freeholders.

Petitioners ask this Court to extend these case holdings substantially beyond absolute preclusion of the right to vote or to hold office, so as to cover incidental burdens, not even directly on the right to vote, but rather merely on obtaining knowledge relative to municipal affairs. This Court has held that strict scrutiny analysis does not extend so far.

In *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), jail inmates who could not readily appear at the polls because they were unable to post bail challenged the constitutionality of an Illinois statute which did not permit them to obtain absentee ballots. They argued that the absentee ballot provisions violated the Equal Protection Clause. This Court held that a strict scrutiny analysis was *not* required because the distinctions made by the absentee provisions were not drawn on the basis of race or wealth and, secondly, there was nothing in the record to indicate that the statute had an impact on the prisoners' ability to exercise the fundamental right to vote. This Court stated:

> It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, *the absentee statutes*, which are designed to make voting more available to some groups who cannot easily get to the polls, *do not themselves deny appellants the exercise of the franchise*; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. [citing statute]. *Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims.*

Id. at 807-808, emphasis added. Thus, the Court stated, the record "is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." Id. at 808, n.6.

In *McDonald*, this Court rejected the claim of those who said that because they could not afford to post bail, they were being denied their right to vote solely because of indigency:

> Appellants claim secondly that to the extent that they cannot afford the posted bail, they are being denied their right to vote solely because of their indigency, contrary to *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Since there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State, *see* n. 6, supra, we need not reach these two contentions.

Id. at 808, footnote 7.

The *McDonald* requirement of an absolute prohibition from voting solely because of indigency in order to trigger strict scrutiny analysis was specifically approved, or distinguished, in cases cited by Petitioners, *i.e.*, *Bullock v. Carter, supra*, 405 U.S. at 143, *Hill v. Stone, supra*, 421 U.S. at 300, and *Kramer, supra*, 395 U.S. at 626 n.6. In *Bullock v. Carter, supra* at 134, the Court said:

> Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald v. Board of Election*, 394 U.S. 802 (1969).

Similarly here, the operation of § 985.03, Wis. Stats., does not absolutely prohibit or preclude anyone from voting, or assembling, or petitioning their government because of indigency. In *McDonald*, the court said the plaintiffs did not prove they were absolutely prohibited from voting, even though they were locked up in jail. Here, the lack of a free newspaper containing legal notices obviously does not absolutely prohibit anyone from voting, assembling, or petitioning their government. Moreover, there is no proof that the paid circulation newspaper is not available for perusal by the persons in the municipality, if any, who are too poor to pay for a subscription, or that the City could not make copies of the publication available at City Hall, or that the publisher would not make a copy available for review by indigent persons, or that the paper is not available for perusal in the local library. Nor is there any proof that notices are not posted, at City Hall, or otherwise. The availability of alternative devices to obtain the desired benefit precludes strict scrutiny analysis. *McDonald, supra*, 394 U.S. at 808 n.6, *United States v. Kras*, 409 U.S. 434, 446 (1973).

As stated in *Selph v. Council of City of Los Angeles*, 390 F. Supp. 58 (C.D. Cal. 1975), the equal protection clause permits some burdens upon the right to vote in a manner equal with other voters. The Fourteenth Amendment forbids conduct which results in a "total denial of the right to vote on the basis of a class distinction or requirement, or when classes of voters are treated differently." Id. at 62. In *Selph*, the court held that where the right to vote was not totally denied to a physically handicapped person, and reasonable alternatives were provided to the person who found his

polling place physically inaccessible, the traditional standard of rational relationship to a legitimate state objective, rather than strict scrutiny, was the proper analysis. Id. at 62. So here, too, the right to vote, assemble, and petition the government is not absolutely denied by the operation of § 985.03. Nor is there here any proof that alternative methods of obtaining such notice as might impact on a person's decision to vote, assemble or petition the government were absolutely unavailable. The traditional standard of rational relationship analysis is therefore appropriate in testing the constitutionality of § 985.03. *See Lyng v. International Union, UAW*, 485 U.S. 360 (1988), *Lyng v. Castillo*, 477 U.S. 635 (1986).

C. Existing Case Law Makes It Plain That there Is a Rational Basis for § 985.03, Wis. Stats., Sufficient To Validate The Statute.

Any reasonable basis for a classification will validate a statute. A statute will be declared violative of equal protection only when the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts, or a proper state policy. *Kadrmas, supra*, 487 U.S. at 462-465. It is the obligation of the court to locate or to construct a rationale that might have influenced the legislature and that reasonably upholds the legislative determination. *McDonald, supra* at 809.

Many states have paid circulation or paid subscriber statutes restricting newspapers qualified to publish official notices. *See, e.g., In Re Carson Bulletin v. City of Carson*, 85 Cal. App. 3d 785, 149 Cal. Rptr. 764 (Cal. Ct. App. 1978); *In Re La Opinion v. Los Angeles Newspaper Service Bureau*, 10 Cal. App. 3d 1012, 89 Cal. Rptr. 404 (Cal. Ct. App. 1970); *Great Southern Media, Inc. v. McDowell County*, 304 N.C. 549, 284 S.E.2d 457 (1981); *Jones v. Percy*, 237 N.C. 239, 74 S.E.2d 700 (1953); *Williams v. Athens Newspapers, Inc.*, 241 Ga. 274, 244 S.E.2d 822 (1978); *East Suburban Press, Inc. v. Township of Penn Hills*, 40 Pa. Commw. 438, 397 A.2d 1263 (1979); *In Re Avila*, 206 N.J. Super. 61, 501 A.2d 1018 (App. Div. 1985); *Southeastern Newspapers Corporation v. Griffin*, 245 Ga. 748, 267 S.E.2d 21 (1980). Moreover, there has been a "paid circulation" requirement for second class mailing privileges dating back to 1879. *See The Enterprise, Inc. v. United States*, 833 F.2d 1216, esp. 1219-1222 (6th Cir. 1987).

It would be eminently reasonable for the Wisconsin Legislature to conclude that one is more likely to read a publication if one has paid for it than if it simply appears uninvited at one's door. *See In Re Avila*, 206 N.J.Super. 61, 501 A.2d 1018, 1019 (App. Div. 1985).

It would also be reasonable for the Wisconsin Legislature to conclude that a 50 percent bona fide paid circulation requirement struck the proper balance among the competing considerations of circulation to a significant number of persons, confidence that the publication in which the notices are printed will in fact be read by the recipients, and allowance for competition in publishing legal notices by requiring a low minimum number of subscribers.

The Legislature might also reasonably conclude that if a periodical is purchased by a significant percentage of its readers, it more likely will in fact be a "newspaper" as required by the statute and not merely an advertisement circular with a few "news" items included for the purpose of claiming newspaper status. The paid circulation requirement thus enables municipalities to avoid potentially difficult First Amendment problems associated with assessing a publication's content in determining whether a publication meets the definition of a "newspaper" for purposes of § 985.03(c). For all these reasons, § 985.03 easily passes muster under the required rational relationship test.

Petitioners argue that § 985.03, Wis. Stats., is anti-competitive. [Pet. p. 31] Petitioners' position is in fact more anti-competitive than the statute, for it would require at a minimum that the periodical with the greatest number of copies printed must always necessarily be given the contract to publish legal notices — if the Court adopts the Petitioners' assumption that the greater the number of copies circulated, the more likely it is that actual notice will be given, with blanket circulation being constitutionally required.

It is common sense that with more space devoted to advertisements, and less effort put into gathering and reporting news, the more cheaply a periodical can be circulated, so the periodical may submit a lower bid to print legal notices. Therefore,

free blanket circulation publications would never have any competition for the publication of legal notices except from like periodicals with even less news content (making it less likely that the legal notices will be found or read among the collection of advertisements).

The low subscriber thresholds in the statute of 1,000 subscriber copies for first and second class cities, and 300 subscriber copies for third and fourth class cities, were obviously designed to encourage competition, while safeguarding actual readership through the paid circulation requirement. Petitioners' unstated contention is that the largest circulation newspaper should have a monopoly because of the number of copies it distributes. The statute allows for the potential of competition among paid circulation publications, even if they haven't the largest circulation in the area. Petitioners' position would allow for none.

CONCLUSION

For all the foregoing reasons, facts and authorities this Court should deny the Petition for Writ of Certiorari. If reviewed, the decision of the Wisconsin court should be summarily affirmed.

Dated this 5th day of October, 1990.

Respectfully submitted.

By **Carolyn Gnaedinger**
Counsel of Record

Attorney for
Community Newspapers, Inc.
and Elsa R. Schupmehl

QUARLES & BRADY
411 East Wisconsin Avenue
Milwaukee WI 53202-4497
(414) 277-5000

Richard C. Gad, Esq.
RICHARD C. GAD, S.C.
1139 East Knapp Street
Milwaukee WI 53202
(414) 273-1130